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# On Collegiality

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# On Collegiality

Michael L. Seigel

Let's start with a hypothetical. Assume that you are the chief executive officer of Widget Corporation, an enterprise with 200 employees. You have received a series of complaints about a midlevel manager, let's call him Zeus, from inside the company. The complaints are consistent. Zeus is hot-tempered, ill-mannered, and underhanded. He verbally abuses colleagues in the halls and by e-mail; he disrupts meetings, usually by shouting down peers who dare to differ with him; he disparages coworkers both openly and clandestinely; he employs surreptitious tactics to block corporate decisions with which he disagrees; and he openly flaunts his contempt for corporate management. The complainers contend that Zeus's conduct is destroying morale and damaging productivity. You examine Zeus's personnel file and determine that he is a slightly better than average employee in terms of individual output and work ethic. Clients appear satisfied, though not ecstatic, with his service. You know from experience that Zeus's job is not difficult to fill: the last time you advertised for a similar position, 300 qualified persons applied. With all this in mind, you set up a meeting with Zeus to counsel him about his behavior. At the meeting Zeus tells you to get lost. Now you must decide what to do.

Unlike most law professor hypotheticals, the answer to this one is simple. You would fire Zeus. There is simply no reason, legal or otherwise, that you would tolerate a disruptive and insubordinate employee with ubiquitous job skills. Indeed, Zeus's job with Widget might be his last in the industry, assuming prospective employers were to call Widget Corporation for a reference.

Now vary the hypothetical a bit. Instead of the CEO of Widget Corporation, you are the dean of a large law school. Zeus is not a midlevel manager; he is a law professor with tenure. Would you fire Zeus? If you are a typical dean, the answer is almost certainly no. You would likely throw your hands up and urge Zeus's colleagues to grin and bear him. Many of them would be unhappy, but—*notwithstanding* their unhappiness—most of them would probably support your decision. They'd do their best to carry on despite Zeus's disruptive behavior. A number of them would even champion Zeus's "right" to be

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“outspoken,” “contrary,” or, if he’s old enough, “cantankerous.” To them, Zeus is like the neo-Nazis who attempted to march in Skokie, Illinois, in the late 1970s: unfortunate and repugnant, but a necessary evil, the cost of First Amendment (in the case of Zeus, academic) freedom.

In the context of a law faculty, Zeus is the worst-case example of an uncollegial colleague. If the discussion of law deans over dinner or at conferences is any indication, many schools have at least one Zeus, and the unfortunate ones have two or three.<sup>1</sup> In addition, all schools are likely to have one or more faculty with at least some of Zeus’s negative characteristics.<sup>2</sup> Although legal academics generally tolerate their incivility, they do not do so quietly. Complaining about and comparing notes on uncivil colleagues is common practice. And the talk is not always idle. The atmosphere of an institution affects its ability to retain quality faculty, and its reputation influences its ability to recruit new ones. Indeed, sometimes disagreements at a school become so great that open hostility erupts; in extreme cases, the situation gets so out of control that it finds its way into the popular press, affecting the school’s external standing.

Interestingly, though much talked about in academic circles, collegiality has received scant attention in academic writing.<sup>3</sup> It appears that members of

1. I have witnessed some of these conversations personally, having served as associate dean for academic affairs at the University of Florida Levin College of Law from July 1, 1999, to June 30, 2001. Although my interest in collegiality stems in part from my experience as associate dean, I must stress that neither Zeus nor any other hypothetical person referenced in this article is based upon any single colleague of mine at the University of Florida. Rather, for purposes of illustration I have created fictitious characters and have fashioned examples drawing from all aspects of my personal and professional experience, psychological and other literature, and stories that I have heard (perhaps some apocryphal) about people at other institutions and workplaces.
2. Indeed, on January 23, 2004, I spoke with the dean of a major U.S. law school who had recently announced his intention to step down because, as he privately revealed, he’d grown tired of dealing with the 15 to 18 Zeus-like characters on his faculty of about 40.
3. One recent and notable exception to this proposition is Gregory M. Heiser, *Because the Stakes Are So Small: Collegiality, Polemic, and Professionalism in Academic Employment Decisions*, 52 U. Kan. L. Rev. 385 (2004). Heiser analyzes the problem of collegiality from a sociological perspective and, interestingly, draws conclusions similar to those I reach through a more pragmatic approach. Otherwise, a review of the literature turns up a few articles discussing the legal implications of using collegiality as a criterion in the promotion and tenure process. See, e.g., Mary Ann Connell & Fred G. Savage, *Does Collegiality Count?* 87 *Academe* 37, 37–40 (2001) <[www.aaup.org/publications/academe/01nd/01ndcon.htm](http://www.aaup.org/publications/academe/01nd/01ndcon.htm)> (2001); Mary Ann Connell & Frederick G. Savage, *The Role of Collegiality in Higher Education Tenure, Promotion, and Termination Decisions*, 27 J. C. & U. L. 833 (2001) [hereinafter *The Role of Collegiality*]; Edgar Dyer, *Collegiality as a Factor in Faculty Employment Decisions at Public Colleges and Universities: A Selective Review of the Caselaw*, 152 *Educ. L. Rep.* 455 (2001); Perry A. Zirkel, *Mayberry v. Dees: Collegiality as a Criterion for Faculty Tenure*, 12 *Educ. L. Rep.* 1053 (1983); Kent M. Week, *Collegiality and the Quarrelsome Professor*, *CLI Newsletter* <[www.collegelegal.com/lccolleg.htm](http://www.collegelegal.com/lccolleg.htm)> (last visited Feb. 2, 2003). Sometimes the topic of collegiality arises in articles that focus on the more general issue of academics’ professional ethics. See, e.g., Daniel Callahan, *Should There Be an Academic Code of Ethics?* 53 J. Higher Educ. 335, 337–38 (1982); Wendy Wassing Roworth, *Professional Ethics*, Day by Day, *Academe* 1 (2002) <[www.aaup.org/publications/Academe/02JF/02Jfrow.htm](http://www.aaup.org/publications/Academe/02JF/02Jfrow.htm)>. Tellingly, a number of articles purporting to grapple with academic ethics make no mention of collegiality. See, e.g., Diane M. Felicio & Jean Pieniadz, *Ethics in Higher Education: Red Flags and Grey Areas*, 9 *Fem. & Psychol.* 53 (1999); Deborah L.

the academy view collegiality, or the lack thereof, as a condition of employment—or a fact of life—rather than a subject of study and debate. This article seeks to fill some of the void. The first part attempts to define the term *collegiality*. It turns out that there is a wide disparity between formal definitions and common usages of the word. With a working definition established, part II looks at the strains on collegiality endemic to the academic setting and then examines arguments for and against the institution of a norm of collegiality on law faculties.<sup>4</sup> This part also examines legal issues bearing on the subject, particularly the perceived tension between enforcement of collegiality and the protections provided by the doctrine of academic freedom. The conclusions drawn in this section are that collegiality is beneficial and that enforcing it is, on balance, a lawful and worthwhile goal. Part III examines methods of promoting collegiality in law schools. It proposes that the best method is faculty self-regulation, and it sets out for consideration a model Statement of Academic Professional Responsibility. Part IV deals with the reality that, unfortunately, some people will never be collegial. This part provides a partial topography of such “difficult people” and suggests strategies to deal with them. It ends with a look at some of the most contentious people around—those suffering from debilitating (and from the recipient’s perspective, infuriating) psychological infirmities—and includes a close examination of borderline personality disorder, or BPD. The premise underlying this section is that an otherwise collegial faculty should not allow itself to be confounded by a small number of impossibly antagonistic colleagues.

## I. Defining Collegiality

### A. Existing Usage

*Collegiality* is a term that appears to have taken on new meanings over time. The word does not even appear in the 1983 edition of Webster’s New Twentieth Century Unabridged Dictionary, which is equally unhelpful in defining *collegial* to mean “relating to . . . belonging to . . . [or] having the nature of a college.”<sup>5</sup> Perhaps reflecting an increasing use of the word, more recent

Rhode, *The Professional Responsibilities of Professors*, 51 *J. Legal Educ.* 158 (2001); George M. Schurr, *Toward a Code of Ethics for Academics*, 53 *J. Higher Educ.* 318 (1982); Michael Scriven, *Professorial Ethics*, 53 *J. Legal Educ.* 307 (1982) (focused primarily on the ethics of teaching); David H. Vernon, *Ethics in Academe—Afton Dekanal*, 34 *J. Legal Educ.* 205 (1984).

Books devoted to the subject of politics and conflict in the academic setting typically contain a chapter or two devoted to conflict among peers. See, e.g., James L. Bess, *Collegiality and Bureaucracy in the Modern University* 85–114 (New York, 1988); Cynthia Berryman-Fink, *Can We Agree to Disagree? Faculty-Faculty Conflict*, in *Mending the Cracks in the Ivory Tower*, ed. Susan A. Holton, 141 (Bolton, 1998); Raymond R. Leal, *From Collegiality to Confrontation: Faculty to Faculty Conflicts*, in *Conflict Management in Higher Education*, ed. Susan A. Holton, 19 (San Francisco, 1995); Karl Hostetler, *Ethics of the Profession: Complexities of Collegiality, Professionalism, Morality, and Virtue*, in *The Art and Politics of College Teaching*, 2d ed., eds. Karl D. Hostetler et al., 323 (New York, 2001).

4. Collegiality is an issue in every college and department of every university. Although much of this article is of general applicability, the focus is on faculties of law.
5. Webster’s New Twentieth Century Dictionary of the English Language Unabridged, 2d ed., 356 (New York, 1983) [hereinafter Webster’s 2d ed.].

dictionaries contain a separate entry for *collegiality*. Nevertheless, the standard dictionary definition—"the relationship between colleagues"<sup>6</sup>—is only a shadow of actual usage. When a faculty member accuses a colleague of being uncollegial, he typically means far more than that the colleague is refusing to have a relationship with him. Rather, the comment is loaded with criticism of the colleague's professional behavior.

On its way toward concluding that collegiality should not be an express component of the promotion and tenure process in higher education, the American Association of University Professors defines the term as "collaboration and constructive cooperation."<sup>7</sup> Though a bit closer to common usage than the dictionary definition, this elucidation also misses the mark. For one thing, it is overinclusive. Most law faculty rarely collaborate with fellow members of their home institution, at least in connection with their scholarly agenda. This is not because the average law teacher is uncollegial; rather, it is because legal scholarship tends to be a solitary pursuit, often so specialized that no two people on the same faculty share the expertise necessary for productive collaboration. Similarly, a teacher may choose, at times, to be uncooperative—if, for example, cooperation would mean participating in some administrative objective set for the institution with which the teacher disagrees—without such contrary behavior's bearing at all on the teacher's degree of collegiality. Indeed, if it reflects the teacher's honest judgment about the best interests of her institution, lack of cooperation may be an extremely collegial act. In the end, one wonders whether the AAUP chose such a clumsy definition of collegiality to make the task of rejecting it as a criterion for faculty evaluation that much easier.<sup>8</sup>

The literature on collegiality provides only moderate assistance in fashioning a definition. Collegiality has been variously defined as the ability to "get along," "fit in," or "work well with colleagues";<sup>9</sup> or to "demonstrate good academic citizenship," or "contribute to a collegial atmosphere."<sup>10</sup> These definitions are, on the whole, vague, circular, or both. Karl Hostetler's working definition—"collegiality means being a good colleague, being decent and civil to other people"<sup>11</sup>—is on the right track, but it too is rather indefinite. Other scholars have approached the definition of collegiality through negative territory—for instance, characterizing the absence of collegiality as exhibiting "personality problems significant enough to . . . reflect extreme and disruptive behavior,"<sup>12</sup> or engaging in actions "that unduly create hostile and

6. Webster's Third New International Dictionary of the English Language, 3d ed., 445 (Springfield, Mass., 1993).

7. On Collegiality as a Criterion for Faculty Evaluation <<http://www.aaup.org/statements/Redbook/collegia.htm>> (Nov. 1999) [hereinafter On Collegiality].

8. The AAUP specifically recommends that collegiality be accounted for through evaluation of the three traditional criteria on which academics are measured: teaching, scholarship, and service. See *id.*

9. Connell & Savage, Does Collegiality Count? *supra* note 3, at 1.

10. Connell & Savage, The Role of Collegiality, *supra* note 3, at 833.

11. Hostetler, *supra* note 3, at 324.

12. Tamar Lewin, 'Collegiality' as a Tenure Battleground, N.Y. Times, July 12, 2002, at 12.

abrasive relationships with colleagues."<sup>13</sup> Courts have also weighed in on the matter, one defining collegiality as "the capacity to relate well and constructively to the comparatively small bank of scholars on whom the fate of the university rests."<sup>14</sup> This latter definition raises more questions than it answers. Do colleagues truly need to "relate well" to each other? Or was the court suggesting something more Machiavellian—that a faculty member needs to get along with his institution's power-wielding insiders or risk endangering his career?

Statements on good practices and professional ethics for university and law teachers provide additional, but limited, aid in defining collegiality. Interestingly, these statements shy away from explicit use of the term, though they include some exhortations that most observers would consider as falling under a collegiality umbrella. For instance, the AAUP's *Statement on Professional Ethics* declares, "Professors do not discriminate against or harass colleagues. They respect and defend the free inquiry of associates. In the exchange of criticism and ideas professors show due respect for the opinions of others. Professors acknowledge academic debt and strive to be objective in their professional judgment of colleagues."<sup>15</sup>

Similarly, the Association of American Law Schools' *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities* contains a section devoted to "Responsibilities to Colleagues." In this section, the AALS states that a law professor should (1) treat colleagues with "civility and respect"; (2) ensure that junior faculty know that there will be no adverse professional consequences from expressing or acting on beliefs or opinions contrary to those of more senior faculty; (3) refrain from applying any pressure other than persuasion on the merits in an effort to influence a colleague's vote; (4) make promotion and tenure and other peer evaluations exclusively on the merits; and (5) make himself reasonably available to colleagues for purposes of discussing teaching and scholarship. Finally, the statement reminds law teachers not to commit sexual harassment or discrimination based upon race, color, religion, national origin, sex, sexual orientation, disability or handicap, or political beliefs.<sup>16</sup> Although the AAUP and AALS principles are laudable and surely have something to do with collegiality, they appear to have been written without much analytical precision.

### *B. Definition*

Out of this definitional labyrinth, one can begin to build a useful taxonomy of the concept of collegiality. The most important differentiation is between three levels of behavior: affirmative collegiality, passive collegiality, and affir-

13. Week, *supra* note 3, at 1. The definition appears to be derived from sociology, which describes collegiality as a collection of attributes exhibited by a collegial—as opposed to a bureaucratic—organization. In the aggregate, the attributes depict a group of professionals who are formally equal and effectively self-governing. See Heiser, *supra* note 3, at 8–9.

14. *Mayberry v. Dees*, 663 F.2d 502, 514 (4th Cir. 1981).

15. Available at <<http://www.aaup.org/statements/Redbook/Rbethics.htm>> (June 1987).

16. Available at <<http://www.aals.org/ethic.html>> (Nov. 17, 1989).

mative uncollegiality. This differentiation is critical because of the traditional distinction in law and morality between aspirational, minimally acceptable, and unacceptable behavior. Although it would be nice for all law teachers to be affirmatively collegial—to be outstanding, even model colleagues—it is acceptable for them to be passively collegial—in effect, to live and let live. Only affirmatively uncollegial behavior should result in sanctions, to be discussed at greater length later in this article.

### 1. Baseline Collegiality

Let's examine the midlevel first. Here is a one-sentence definition for baseline collegiality: *conducting oneself in a manner that does not impinge upon the ability of one's colleagues to do their jobs or on the capacity of one's institution to fulfill its mission.* This means, first and foremost, treating peers civilly, though not necessarily cordially,<sup>17</sup> and refraining from ad hominem attacks in any setting and under any circumstances whatsoever. It implies doing one's job—teaching, research, and service—at a minimally acceptable level, because if one is not pulling one's institutional weight, somebody else has to make up the difference. Essential collegiality also entails always acting in good faith, that is, in concert with one's honest judgment as to the best interests of one's institution. A passively collegial faculty member does not gratuitously attack or impugn her home institution or its administration publicly or privately;<sup>18</sup> likewise, she does not engage in disagreements with administrators or colleagues unless she honestly believes that disagreement is necessary to further her own legitimate interests or the interests of her school.

For a passively collegial faculty member, means are just as important as ends. Baseline collegiality requires that one conduct all disagreements with civility and through means solely designed, as the AALS admonishes, to persuade on the merits. Deceit, intimidation, corruption, and personal attacks are not acceptable forms of behavior, regardless of the stakes. Finally, baseline collegiality requires accepting the collective judgment of one's colleagues after an open and honest debate. There is nothing wrong with fighting a good, clean, principled—even passionate—fight, but when the battle is clearly lost, it is time to move on in good (or at least not bad) humor. Prolonging doomed battles, or exhibiting only grudging and grouching acceptance of a new policy enthusiastically embraced by the majority, is selfish and harmful to the institution.

In light of existing literature and common parlance, it is equally important to delineate what passive collegiality does not encompass.<sup>19</sup> It certainly does not mean that a faculty member needs to “fit in” with his colleagues in any fashion whatsoever. Academia is and should be a place where smart (perhaps

17. *Civility* can have many meanings. I use it here in the traditional dictionary sense to mean being polite, considerate, and courteous. *Cordiality* implies warmth and affection. Although it is certainly rewarding when one develops a cordial relationship with at least some of one's colleagues, the universal presence of civility is sufficient to maintain a collegial atmosphere.

18. The key word in this phrase is “gratuitously.” Obviously, using public and private criticism of existing institutional policy can be a very effective way to bring about change.

19. See Connell & Savage, Does Collegiality Count? *supra* note 3, at 1.

brilliant) people who can't or don't want to fit in anywhere else (often because they are not attuned to the mundane practical implications of knowledge) are left to revel in their own scholarly devices, enabling them to further humankind's search for knowledge in their own unique way. It is to be expected that such individuals are unlikely to fit in with each other. Their diversity—intellectual and otherwise—is cause for celebration, though it can at times also be a cause of some administrative consternation. Nevertheless, as long as each faculty member does her job and exhibits essential collegiality, she can be as individualistic, eccentric, and downright odd as she cares (or was born) to be.

Moreover, contrary to the AAUP's Statement on Professional Ethics, collegiality does not necessarily require "showing due respect for the opinion of others."<sup>20</sup> The question is what is meant by "respect." One definition of the term is "to notice with special attention, to regard, to heed, [or] to consider."<sup>21</sup> To the extent that simply considering the opinions of colleagues is an essential underpinning of civil discourse, then the AAUP is correct in proffering respect as a requirement of professional or collegial conduct. But the notion of respect is more commonly taken to mean "to view, treat, or consider with some degree of reverence, deference or courtesy; to feel or show honor or esteem for."<sup>22</sup> This is emphatically not a requirement of baseline collegiality; blindly or automatically deferring to the opinions of others runs counter to the academic enterprise. Academics should be free to show complete and utter contempt for intellectual positions with which they disagree. This kind of free-for-all is the fuel of the academic engine.<sup>23</sup> The key for maintaining essential collegiality, however, is that lack of respect must be confined to the opinion and not be directed at the person; all attacks must be focused on the idea, not the individual espousing it. This is sometimes a fine distinction, but it is a critical one.<sup>24</sup>

As I've said, simple collegiality does not require a faculty member to cooperate or collaborate with others—except to the extent that cooperation or collaboration is otherwise a requirement of the job. There is nothing

20. Available at <<http://www.aaup.org/statements/Redbook/Rbethics.htm>> (June 1987).

21. Webster's 2d ed., *supra* note 5, at 1542.

22. *Id.*

23. In fact, being witness to a heated intellectual debate during law school is probably what caused me to become a law teacher myself. I was a student at Harvard in the early 1980s, when a battle was raging between the advocates of critical legal studies, including Jerry Frug, Duncan Kennedy, and Roberto Unger, and those defending legal formalism, led by Charles Fried and others. The intensity of this intellectual debate can hardly be exaggerated. Frug, in particular, regaled my Contracts class almost daily with the deconstruction of formalistic thought. To his credit, although he mocked and belittled Fried's philosophical positions, Frug never said a negative word about Fried personally. Then, in midsemester, he invited Fried to teach our class and defend his principles. Fried accepted the invitation. I had never been so intellectually challenged and exhilarated in my life. Of course, I was not privy to the personal relationship between Frug and Fried, and can only hope that it was truly collegial.

24. It is for this reason that academics do need to be tolerant and thick-skinned. Suffering an attack on one's closely held beliefs is undoubtedly difficult and upsetting, but it does not mean that one has been victimized by lack of collegiality. It is the price one pays for participation in academia.



uncollegial, in its baseline sense, in refraining from unnecessary interaction with colleagues or the administration. Thus a collegial person might be an introvert or loner; these are simply a personality trait and lifestyle, respectively, not problems. The picture is dramatically different, however, if others cannot do their jobs without this person's interaction or assistance. Under these circumstances, failure to act would violate the basic norm of collegiality. For example, a law teacher who is not wild about his dean need not go out of his way to attend, say, weekly school-sponsored brown-bag lunches with her. An obligatory annual evaluation meeting, however, is a different matter. If the disaffected teacher refuses to attend a required meeting with the dean, he is acting uncollegially: he is failing to do his job, and he is preventing the dean from doing hers.<sup>25</sup>

As a second example, assume that faculty member X was hired as part of the team that teaches the first-year legal research and writing course offered at most American law schools. As part of his job, X is required to attend weekly departmental meetings that are substantive and collaborative. In them, the writing faculty assist each other in developing pedagogical strategies for instructing students with special needs; they review common questions raised by past assignments and formulate consistent answers; they jointly edit drafts of future writing assignments; and they monitor and adjust the course syllabus. X refuses to attend these meetings, claiming that they are a waste of his time. He obtains the minutes of each meeting, however, uses all of the joint problems, and follows the prescribed syllabus. He gets outstanding teaching evaluations from both students and peers.

Under the circumstances described, X's refusal to participate in the departmental meetings fails baseline collegiality. He is a free rider: a person benefiting from others' hard work without making his own contribution to the effort. This is simply unfair. Moreover, his behavior is sure to affect the morale of his colleagues, making it more difficult for them to do their jobs well.<sup>26</sup> This could be true even if X were somehow to persuade his boss, the director of the legal research and writing program, to exempt him from participation in the meetings. Such an exemption might simply institutionalize a lack of fairness, with further negative effect on X's colleagues.<sup>27</sup>

25. Cf. *Jawa v. Fayetteville*, 426 F. Supp. 218, 223 (E.D.N.C. 1976) (upholding firing of tenured professor who, among other things, refused to meet with his department chair when directed to do so, saying that he "was not an office boy").

26. Cf. *Kirsch v. Bowling Green State University*, No. 95API11-1476, 1996 Ohio App. LEXIS 2247 (Ohio C. App. May 30, 1996) (upholding denial of tenure based, in part, on Kirsch's refusal to participate in departmental meetings discussing course content and curriculum); *Bresnick v. Manhattanville College*, 864 F. Supp. 327 (S.D.N.Y. 1994) (upholding denial of tenure to dance teacher who refused to collaborate with other music colleagues to the detriment of the students).

27. The above examples make clear that the AAUP's argument that collegiality need not stand as a separate measurement of an academic's performance—distinct from teaching, research, and service—is fundamentally flawed. The faculty member's refusal to cooperate with the dean in the first hypothetical, and X's failure to attend departmental meetings in the second, are likely to have little or no impact on the traditional evaluation of their academic performance. Assume, for instance, that X gets fired for his refusal to attend the staff meetings. His defense likely would be (1) the school cannot criticize my teaching, which is by all accounts exemplary; (2) these meetings have nothing to do with scholarship; and (3) although one

## 2. Affirmative Collegiality

The best colleagues are more than passively collegial; they are actively so. Affirmatively collegial faculty typically go beyond the call of duty in some aspect(s) of their job, depending upon their interests and talents. They might take on additional teaching assignments, perhaps to relieve an overburdened peer, or to ensure that their colleagues can take sabbaticals when eligible, or simply out of dedication to students. Others publish substantial quantities of exceptional scholarship, bringing recognition not only to themselves but to their academic institution as well. Some routinely accept extraordinary administrative assignments, such as chairing a difficult committee or directing an institute or center. In addition to doing their own job exceptionally well, affirmatively collegial colleagues give of themselves to others. They guide and nurture junior faculty; they attend and present papers at faculty workshops and luncheons; they read and comment on colleagues' drafts; they help plan and attend social events. The best colleagues participate in all aspects of law school life, such as the appointments and promotion and tenure processes; they cooperate with and support administrative units of the law school; they volunteer for any worthwhile institutional cause. In short, affirmatively collegial faculty display enthusiasm, dedication, and a constructive attitude, and they work hard to foster harmony among their peers and to further the mission of their institution.<sup>28</sup>

Just as society cannot successfully legislate morality, neither can the academic profession require affirmative collegiality. Nor should it. In furtherance of the fundamental search for knowledge, academia must have room—some might say, plenty of room—for productive people who may be too consumed by their teaching, research, or external service to devote much energy to their institution or peers. Indeed, academia should also be accepting of brilliant teachers and scholars who may be narcissists or social misfits. Nevertheless, many academics will want to aspire to be affirmatively collegial, at least in some respects. Though such behavior cannot be mandated, institutions would be well advised to foster, encourage, and reward positive, community-oriented conduct.

may say that I am failing to serve my institution by avoiding these meetings, my overall service record is outstanding—better than most of the rest of the writing faculty. A response based on the AAUP's position might be that X's teaching is in fact less than exemplary because his teaching responsibilities include collaborating with others. But this unnecessarily clouds the issue: for instance, X may counter by arguing that collaboration is not part of his contract. The more direct approach is to call X's conduct what it is—lack of basic collegiality—and then determine if his violation of this norm of conduct should be sanctionable.

A fair comparison can be drawn between my definition of baseline collegiality and Heiser's definition of collegiality derived from sociology. He says that collegiality

is best understood as citizenship in a professional collective, the ability to collaborate with equals in a non-hierarchical organization in order to maintain the organization's equilibrium, further its goals, and avoid problems such as unproductive members, excessive dominance by one or a few members, and equal access for all members to organizational resources.

Heiser, *supra* note 3, at 412.

28. The AAUP claims that these characteristics should not be confused with collegiality. In actuality, the AAUP confuses the concepts of baseline collegiality and affirmative collegiality. See *On Collegiality*, *supra* note 7, at 1.

### 3. Affirmative Uncollegiality

Unfortunately, the conduct of some law teachers is counterproductive. These individuals move from the neutral territory of passive collegiality to the hostile terrain of affirmative uncollegiality. They may see themselves as “watch-dogs” or “dissidents” or “whistle-blowers,” or they may think that the ends they seek are so laudable as to justify any means. Or they may simply have personality problems. For whatever reason, uncollegial faculty cause problems for their colleagues and their institution.

Affirmative uncollegiality is the mirror opposite of baseline collegiality. It can be defined as *conduct that interferes with the ability of one's colleagues to do their jobs or with the capacity of one's institution to fulfill its mission*. Uncollegial conduct can take many forms. It might be a persistent lack of civility that creates a negative atmosphere and harms faculty morale. Or it might be the habit of sending flaming e-mails, full of nastiness and venom, to colleagues with whom the sender disagrees on issues of law school governance. Uncollegiality also includes such activities as gratuitously denigrating colleagues behind their backs;<sup>29</sup> shouting down opposition at faculty meetings; making false accusations and complaints about colleagues to administrators, or about either or both to external authorities;<sup>30</sup> criticizing colleagues and the institution to outsiders, such as employment candidates or the press; refusing to cooperate or collaborate when these are requirements of one's job; using deceit and other illicit means to achieve institutional goals; and acting in bad faith by advocating and pursuing institutional goals and policies because of self-interest or other illegitimate motive, rather than from a sincere evaluation of the best interests of the institution.<sup>31</sup>

Lack of collegiality should not be confused with good faith criticism and pressure for change. Sometimes a colleague will be an irritant—to his peers, the administration, or both—precisely because he is forcing others to face their own problems and shortcomings. As the AAUP notes, “[g]adflies, critics of institutional practices or collegial norms, even the occasional malcontent, have all been known to play an invaluable and constructive role in the life of academic departments and institutions.”<sup>32</sup> But the distinction can, and must, be made between legitimate activism and destructive behavior. Moreover, a

29. Cf. *McGill v. Regents of University of California*, 52 Cal. Rptr. 2d 466 (Cal. Ct. App. 1996) (upholding denial of tenure because, in part, McGill was criticizing colleagues to candidates for new teaching positions).

30. Cf. *Stein v. Kent State University*, 994 F. Supp. 898 (N.D. Ohio 1998), *aff'd* 181 F.3d 103 (6th Cir. 1999) (upholding refusal to renew contract based upon Stein's filing of frivolous internal and external suits and charges).

31. Occasionally a faculty member exhibits affirmatively uncollegial behavior on almost all fronts. In *Sinnott v. Skagit Valley College*, 746 P.2d 1213 (Wash. Ct. App. 1987), the plaintiff, a tenured welding instructor, was dismissed for (1) making derogatory remarks about colleagues; (2) falsely accusing his department chair of theft; (3) using profanity excessively; (4) constantly criticizing supervisors and coworkers; (5) affirmatively refusing to refrain from the aforementioned conduct; (6) affirmatively refusing to cooperate in curriculum development; and (7) affirmatively refusing to team-teach in a coordinated program.

32. On Collegiality, *supra* note 7, at 1.

great deal depends on how a discontented colleague chooses to conduct himself. As Mahatma Gandhi and Martin Luther King have taught us, profound disagreement and disobedience need not be uncivil.

## II. The Academic Setting

### A. *Strains on Collegiality*

Although I can't prove it empirically, I think problems with collegiality are more prevalent in the academic setting than in other employment spheres, and legal academia appears to experience the phenomenon at its highest levels. Some understanding of the causes of uncollegiality in academia can form a constructive backdrop to a discussion of what can and should be done to combat it.

#### 1. Shared Authority

The decision-making structure of most business enterprises is decidedly hierarchical. Although a supervisor may solicit input from underlings, she makes all final decisions within her realm of authority—subject, of course, to being overruled by her supervisor, and so on up the chain of command. If a supervisee does not like a decision, he is usually powerless to change it.

Academia, on the other hand, is characterized by a far more democratic decision-making structure, at least with respect to its tenured faculty. In theory, faculty members and administrators exercise shared authority over the formulation of policy, procedures, and operating decisions. The matters considered to be within the prerogative of the faculty typically run from the relatively trivial, such as deciding whether eating should be permitted in classrooms, to the extremely important, such as setting the number of credit hours required for graduation from the institution. At law schools this democratic impulse appears to be especially strong. Many law faculties consider their dean merely first among equals, that is, as having no significant authority beyond that of the typical tenured faculty member. And behind this sentiment is power. Law faculties routinely exercise a great deal of control over the selection and retention of their dean, and they are quick to take action if they believe that he has exceeded his power to execute faculty policy by attempting to implement policy of his own.

Shared authority undoubtedly leads to high levels of conflict. The employee in a corporation who disagrees with company policy might carefully mention something to his boss, but if he is rebuffed, he will likely grin and bear it. Not so in the academic setting.<sup>33</sup> A tenured teacher who disagrees with

33. The distinction is real, as I can attest from personal experience. As first assistant U.S. attorney for the Middle District of Florida, I supervised about 100 other attorneys and about the same number of nonattorney support personnel. The administrative structure of a U.S. attorney's office is extremely hierarchical: after the U.S. attorney himself, the first assistant is the second-in-command of the office. I know that on a number of occasions I participated in decisions that upset and probably outraged one or more of the office's prosecutors. Although assistant U.S. attorneys frequently voiced their opinions on the merits of particular issues, no one ever challenged my authority or refused to accept my (or the U.S. attorney's) ultimate judgment. By way of contrast, in the law school setting, simply referring to the associate dean as having "authority" vis-à-vis the tenured faculty would likely evoke controversy and debate—or simply derision.

policy has the ability to seek its change by convincing her colleagues that change is warranted. This involves bringing the matter to the administration's attention; getting it referred to the appropriate faculty committee; ensuring that the committee follows through with a beneficial proposal that is placed on the agenda of a faculty meeting; politicking in halls, offices, and dining rooms; debating the proposal via e-mail with those who prefer electronic communication; and finally discussing, amending (or fending off amendments), and voting on the proposal at the meeting. If the policy is important (or, unfortunately, sometimes even if it isn't), the debate leading up to the vote—both before and during the meeting—can get quite heated. If the vote is close, the matter may be at rest only temporarily; nothing (other than a sense of collegiality, if it exists) prevents the losing side from raising the issue again. Multiply this process by every policy decision a school needs to make, and one gets some sense of the possibilities for conflict and concomitant uncollegiality in the academic setting.

## 2. The Tradition of Unfettered Intellectual Exchange

The culture of academia places a high value on open and honest discussion about ideas and issues. Academics view the ability to voice opinions without restraint, safe from review or retribution, as the essence of academic freedom. There are few things more invigorating to an academic than a passionate debate about intellectual matters dear to his heart. Furthermore, academics consider remaining true to principle an essential aspect of their being. Indeed, no one would desire or expect academics to compromise over fundamental differences on philosophical, scientific, or intellectual matters. Academics are thus accustomed, in effect, to being both outspoken and intransigent, and to being rewarded for these qualities.

Law faculty not only function within academic culture, they are also products of legal training. Despite recent efforts to change their emphasis, law schools still primarily focus on developing skills for adversarial situations, such as the abilities to debate, argue, and persuade. The emphasis is on winning—arguments, cases, appeals. Compromise is often taught as necessary only to avoid total defeat. In addition, students experience law school itself as something of a zero-sum game; facing an extremely hierarchical profession, they can't help but view high grades and class rank as critical to their future success. In this competitive atmosphere, generally speaking, only those who rise to the top of their class—i.e., those who are the best at this intense, adversarial enterprise—are eligible to become law teachers. So it should come as no surprise that law faculty frequently take academia's emphasis on uncompromising and vocal debate to the extreme.

In the free-for-all atmosphere of academia, collegiality requires distinguishing disagreement with or even disdain for a person's ideas from disdain for the person. It also requires drawing distinctions between areas of intellectual debate, where conciliation and compromise are inappropriate, and other areas of disagreement, for instance regarding matters of institutional governance, where these behaviors are essential. Drawing such distinctions is not

necessarily difficult, but the importance of doing so can be easily forgotten in the heat of the moment.

### 3. Tenure

Not only do faculty exert a great deal of authority over institutional policy, most do so with the protection of tenure, that is, with a lifetime appointment. Tenure, which has come under some attack in recent years, has a long and storied history well beyond the scope of this article. It is sufficient for the present inquiry to note that, though designed primarily to protect academics against retribution for extreme or unpopular intellectual positions, tenure also means that a teacher is free to take positions contrary to those of colleagues and university administrators on matters of institutional governance. In effect, tenure is a tremendous leveler: it greatly reduces the authority administrators exercise over individual faculty. A faculty member can vocally oppose his department chair or dean—or even the provost and president—without fear of being fired for it. Though it has some drawbacks, tenure is a valuable practice, essential to the integrity of the academic enterprise. But some people may experience a sense of invincibility arising from the protection of tenure, and that can lead to uncollegial behavior.

### 4. Autonomy

Depending upon the particular field, the academic enterprise tends to be individualistic: faculty pursue their intellectual interests and develop their expertise as essentially autonomous actors. This is certainly true with respect to legal academia. Typically, each law school has one or two, or at most three, experts in a particular area of the law, and usually they conduct their research and writing on their own. If they collaborate, they tend to do it at an inter- rather than intrainstitutional level. While many other endeavors require teamwork, the pursuit of legal knowledge does not, and as a result legal academia does not place a high value on getting along well with others. A faculty member's strong sense of intellectual autonomy can spill over into other matters, such as institutional governance, for which teamwork and cooperation are essential.

### 5. Electronic Communication

Far from unique to the academic setting, but having significant impact upon it nonetheless, is the rise of e-mail communication. E-mail has fundamentally altered the nature of human interaction, particularly at the workplace. Although much of the change is positive, electronic communication can also have a profoundly negative impact on the level of collegiality among a group of peers.

E-mail usage has received considerable study from academic psychologists and others.<sup>34</sup> A number of points are quite well established. First, e-mail often

34. See, e.g., *Psychology and the Internet*, ed. Jayne Gackenbach (San Diego, 1998); Lee Sproull & Sara Kiesler, Reducing Social Context Cues: Electronic Mail in Organization Communication, 32 *Mgmt. Sci.* 1492 (1986); Phillip A. Thompson & Davis A. Foulger, Effects of Pictographs and Quoting on Flaming in Electronic Mail, 12 *Computers in Hum. Behav.* 225 (1996).

takes the place of face-to-face conversation. Indeed, in many instances e-mail is far more efficient than face-to-face communication, especially among a group of individuals, because it is asynchronous, that is, it need not be conducted in real time. On the other hand, e-mail communication lacks several extremely important features that characterize its ancient counterpart. As they compose their messages, e-mail authors are alone at their computers, uninfluenced by human interaction and shielded by a veil of technology. Moreover, the messages themselves are generally devoid of visual, vocal, and social status cues.<sup>35</sup>

The unique characteristics of e-mail lead to what psychologists have labeled the “disinhibition effect” of electronic communication. Disinhibition is “any behavior that is characterized by an *apparent* reduction in concerns for self-presentation and the judgment of others.”<sup>36</sup> Some aspects of disinhibition are positive; for instance, it has been said that e-mail is an “equalizer,” emboldening individuals to communicate across otherwise impenetrable boundaries of social status and power. Similarly, e-mail is a means by which a timid person may feel sufficiently comfortable to participate in a conversation. But by far the most impressive aspect of disinhibition is the negative phenomenon of “flaming,” that is, expressing oneself in extreme, hostile, and socially unacceptable ways. Although there is some academic debate on the nature and extent of flaming, most observers—indeed, most users of e-mail—agree that it is a widespread problem. This has led to countless articles on e-mail etiquette, which are, of course, useful only to the extent that someone wants to avoid accidental flaming. Unfortunately, a considerable amount of flaming is intentional.

Some of the previously discussed characteristics of academia can make faculty particularly susceptible to the temptation to flame. As autonomous units, faculty members have little need to see each other in person except at occasional committee and faculty meetings; e-mail communication can easily become the norm. Academics are acculturated to weigh into community discussions, and they do so believing that it is their right, if not their duty, to express themselves with passion and conviction. Their jobs are secure. For a few, passion can turn into excess, conviction into sarcasm and vitriol.

## 6. Ambiguity in Measuring Value

Academia is unparalleled in the ambiguity of the value of its outputs. Businesses have the bottom line; lawyers can measure bottom line and billable hours. Even the productivity of government workers can usually be quantified, for example, by how many papers are processed per day, or citizens/customers handled, or—for government lawyers—cases carried to completion. But the

35. Of course, we are starting to see an increased use of pictographs in e-mails, that is, typographical symbols that convey such cues as the expression of emotion or an indication that something is meant as a joke. Pictographs increase, though very slightly, the amount of nonverbal information that can be communicated electronically.

36. Adam Joinson, Causes and Implications of Disinhibited Behavior on the Internet, in *Psychology and the Internet*, *supra* note 34, at 43, 44.

valuation of teaching, research, and service is nearly impossible. For instance, how does one compare the relative worth of different forms of scholarship? Law faculty endlessly debate whether a law review article deserves more respect than, say, a casebook catering to the student market, or a treatise designed for practitioners. There is even substantial disagreement about the relative worth of articles solicited and written for symposia compared to articles written and submitted without a prior promise of publication. Layered on top of this complexity is the difficulty of comparing scholarship to teaching and service. Is a person who teaches twelve credit-hours a year and publishes an article once every two years more or less productive than one who teaches eight credits but publishes two pieces a year? How about one who teaches ten credits, updates a book written a number of years ago, and oversees a department?

In this atmosphere of uncertainty, human nature tempts individual faculty to place a higher value on their own output than that of others. The scholars may view the "mere teachers" as neanderthals, and the teachers may see the scholars as prima donnas who overestimate the importance of their efforts. These tensions are exacerbated by the fact that the administration has no choice but to take a position on these matters, if not explicitly, then implicitly by setting salaries and determining the distribution of such perks as chairs and high-visibility assignments. The end result is an atmosphere in which respect among peers cannot be assumed and balkanization is not uncommon. These are conditions ripe for incivility and uncollegiality.

### *B. Is Enforcement of Collegiality a Good Thing?*

Given the nature of the academic enterprise, lapses in collegiality are bound to occur. It is hard not to argue that this is unfortunate, and that the academic world would be a better place if all of its inhabitants were at least baseline—if not affirmatively—collegial. The more difficult issue is whether the faculty of a particular institution, or the institution itself, should undertake to enforce a norm of baseline collegiality among its members. Should uncollegial behavior be tolerated as an unavoidable cost of doing business, or should it be sanctioned? This section discusses the potential costs and benefits of maintaining a collegial atmosphere in any academic setting, with a special focus on law schools.

#### **1. Benefits**

If uncollegiality is defined as behavior negatively affecting colleagues' ability to accomplish their tasks, one of the obvious and most important benefits of collegiality is the maintenance of an atmosphere in which individual faculty can maximize personal productivity. Uncollegial acts are distracting and demoralizing; they result in needless expenditure of the precious mental and physical energy of affected faculty. If lack of collegiality is the norm on a faculty, productivity may come to a screeching halt.

Here is an example taken not from academia but from my practice of law. When I served as first assistant U.S. attorney, one of my responsibilities involved intervening and attempting to settle employee disputes. On one



occasion a prosecutor, under the stress of a courthouse deadline, lost his temper and screamed profanity at his secretary, who was trying to help him prepare the final papers for filing. The incident occurred in a relatively small branch office. The attorney's behavior was so out of control that several of his colleagues reached me by conference call within minutes of the tirade. I quickly chose a course of action that included obtaining witness statements and presenting the matter for appropriate review and possible discipline.

This single isolated incident of incivility affected the operation of the branch office for many days—not only in the formal sense that employees were pulled from their regular tasks to answer questions and prepare written statements, but also informally, by causing gossip in the halls as people debated the facts and chose sides. Without doubt, productivity was reduced that week. Similar conduct produces similar results in the academic setting. Everyone has limited cognitive resources; if these resources are devoted to being uncollegial or to reacting to the uncollegial acts of others, they cannot be aimed at making progress in the academic mission.

Legal academics have yet another critical reason to be collegial: they are the primary role models for future lawyers. Incivility and unethical behavior in the practice of law have become a serious concern, and a number of commentators have traced the root of the problem, at least in part, to law schools. Even as they learn skills and substance from faculty, students also internalize subtle and sometimes not so subtle messages about appropriate professional behavior. Let's say that a teacher preaches ethics and civility to her students in class, but then demonstrates her own lack of the same by mistreating students or by displaying contempt for her colleagues. Of course, her students learn as much from her actions as they do from her words—if not more.

A third reason for maintaining a collegial atmosphere is to attract and retain quality faculty. Given the choice, no one wants to work in an institution characterized by unpleasantness and a lack of collegiality. Anyone deciding whether to join or leave a particular faculty undoubtedly weighs its level of collegiality into the decision. Of course, the most productive faculty are typically the most mobile. They are the ones most likely to leave an uncollegial institution or to decline a job offer from one. Over time, then, lack of collegiality can reduce a school's overall quality.

Finally, life is short. No one should have to spend it among bickering or backbiting colleagues. In a workplace that provides a consistently upbeat, supportive, and rewarding environment for all those who toil within it, everyone is better off.

## 2. Costs

Despite collegiality's clear benefits, policies aimed at maintaining collegiality in academia are controversial. The fundamental reason for this is the perceived tension between the enforcement of a norm of collegiality and academic freedom. Many academics view tolerance of uncollegiality by peers as the necessary cost of their own protection against institutional interference with their intellectual autonomy.

Academic freedom is a complex concept rooted in tradition, history, and law.<sup>37</sup> Our current conception of it can be traced back at least as far as nineteenth-century Germany.<sup>38</sup> Interestingly, the notion did not rise to the highest level of American academic consciousness until 1915, when the AAUP issued a report on the subject.<sup>39</sup> The axioms outlined in the report were later codified in the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure. Reaffirmed in 1970, these principles include:

- a. Teachers are entitled to full freedom in research and in the publication of the results subject to the adequate performance of their other academic duties . . . .
- b. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. . . .
- c. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinion of others, and should make every effort to indicate that they are not speaking for the institution.<sup>40</sup>

Many academics would probably be surprised at the limited scope and tentative wording of the AAUP's definition of academic freedom. Read in the most expansive fashion possible, these aspirational principles define only a finite area in which faculty are entitled to full autonomy: scholarship and teaching. According to the AAUP, an academic should never be sanctioned in connection with intellectual pursuits, regardless of deviation from accepted orthodoxy, as long as he is acting responsibly. But nowhere does the AAUP statement entitle a member of a faculty to be uncollegial, as I have defined that term.

Similarly, uncollegial behavior receives no protection from the complex doctrine that has developed around the legal concept of academic freedom.<sup>41</sup>

37. A number of fascinating books have been written or compiled on the subject. See, e.g., *Unfettered Expression: Freedom in American Intellectual Life*, ed. Peggie J. Hollingsworth (Ann Arbor, 2000); Robert M. O'Neil, *Free Speech in the College Community* (Bloomington, 1997); *The Future of Academic Freedom*, ed. Louis Menand (Chicago, 1996); Neil Hamilton, *Zealotry and Academic Freedom* 159–86 (New Brunswick, N.J., 1995); *The Concept of Academic Freedom*, ed. Edmund L. Pincoffs (Austin, 1975).

38. Todd A. DeMitchell, *Academic Freedom—Whose Rights: The Professor's or the University's?* 168 *Educ. L. Rep.* 1, 3 (2002).

39. *Id.* A history of the principle of academic freedom in the United States can also be found in Hamilton, *supra* note 37, at 159–86.

40. 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments <<http://www.aaup.org/statements/Redbook/1940stat.htm>> (last visited Feb. 7, 2003) (footnotes omitted).

41. An excellent overview of the legal parameters of academic freedom can be found in Steven G. Poskanzer, *Higher Education Law: The Faculty* 5–142 (Baltimore, 2002).

One aspect of this doctrine is the special free speech protection afforded academics under the First Amendment. Despite some sweeping and dramatic language employed in a few early Supreme Court cases,<sup>42</sup> this protection is relatively circumscribed. As an initial matter, the First Amendment provides protection only against state action; thus it constrains administrative conduct or decision making only in the context of faculty who are employees of public colleges and universities.<sup>43</sup> Moreover, a number of courts have interpreted the free speech protection afforded academics as being no greater than that afforded to all other state employees, and others have noted the tension between the First Amendment freedom of the university or faculty as a whole and the freedom of its individual members.<sup>44</sup> One court has even held that academic freedom is a right exclusively retained by the university vis-à-vis the state, as opposed to a right held by faculty members vis-à-vis their university.<sup>45</sup> On the specific question of whether the First Amendment provides protection for uncollegial activity, courts have uniformly answered in the negative.<sup>46</sup>

In the context of private colleges and universities, academic freedom protects faculty from administrative action only to the extent it is embodied—explicitly or implicitly—in a faculty member’s employment contract.<sup>47</sup> A review of the cases makes clear that courts are very wary of treating a faculty member differently from any other contractual employee.<sup>48</sup> Indeed, often

42. For example:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

*Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Later the Court issued these words:

Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

*Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

43. See Poskanzer, *supra* note 41, at 11–16; Richard H. Hiers, *Institutional Academic Freedom v. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J. C. & U. L. 35 (2002).
44. See Hiers, *supra* note 43, at 64–103. A full delineation of the complex law of academic freedom is well beyond the scope of this article.
45. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc). Todd DeMitchell agrees with the Fourth Circuit’s interpretation of the First Amendment, while Richard Hiers adamantly disagrees. See DeMitchell, *supra* note 38; Hiers, *supra* note 43.
46. The seminal case in the area is *Mayberry v. Dees*, 663 F.2d 502 (4th Cir. 1981), *cert. denied*, 459 U.S. 830 (1982), in which the court explicitly upheld the ability of a university to enforce a collegiality requirement.
47. See Poskanzer, *supra* note 41, at 19–22; DeMitchell, *supra* note 38, at 10.
48. A 1983 study concluded that defendant institutions prevailed in about 80 percent of faculty employment cases, including First Amendment cases. The percentage for non-First Amendment cases alone was even higher. See Perry A. Zirkel, *Personality as a Criterion for Faculty Tenure: The Enemy It Is Us*, 33 Clev. St. L. Rev. 223, 226 (1984–85).

special deference is given to university administrators (sometimes in the name of academic freedom) to operate their institutions as they see fit.<sup>49</sup> The bottom line is that academic freedom as a contractual right of individual academics is quite narrow. It manifestly does not protect those whose behavior has been legitimately deemed uncollegial by their colleagues or institution.<sup>50</sup>

None of this is to say that tension between enforcement of collegiality and academic freedom does not exist. The real problem is not actual conflict between the two values but the risk that enforcement of collegiality will be abused—that the autonomy of individual faculty will be unduly circumscribed under the guise of achieving collegiality. Without doubt, this is a serious and substantial concern. It is likely that most academics who oppose the enforcement of a collegiality norm and who champion the rights of even the most uncollegial of their colleagues do so out of fear of such abuse.

Abuse of a collegiality requirement can easily result in someone's being punished for expressing unpopular views. Perhaps the best evidence of this is anecdotal. A recent and somewhat notorious case on point is historian Robert D. Johnson's denial of tenure at Brooklyn College. At age thirty-four, Johnson was a graduate of Harvard University and the author of twenty-six scholarly publications, including three books—two published by Harvard University Press.<sup>51</sup> According to media reports, Johnson "has a first rate teaching record and consistently receives rave reviews from students."<sup>52</sup> As late as April 2001, the chair of Brooklyn College's history department wrote that "in every category of measurement—in teaching effectiveness, scholarship, and in service to the department, the college, and the university—[Johnson] has performed in an exemplary manner."<sup>53</sup> Nevertheless, in May 2002 the committee reviewing Johnson's application for tenure recommended denial on the basis of insufficient collegiality.<sup>54</sup> The college followed that recommendation.<sup>55</sup> The decision prompted twenty-four distinguished historians around the country to sign a letter of protest.<sup>56</sup>

49. The term sometimes used for this principle of deference is *academic abstention*. See *id.* at 237–38.

50. One court has summed up the relationship between the two concepts this way: "Academic freedom is not a license for activity at a variance with job-related procedures and requirements, nor does it encompass activities which are internally destructive to the proper functioning of the university or disruptive of the educational process." *Stastny v. Central Washington University*, 647 P.2d 496, 504 (Wash. Ct. App. 1982), *cert. denied*, 460 U.S. 1071 (1983).

51. Karen W. Arenson, *Star Scholar Fights for His Future at Brooklyn College*, N.Y. Times, Dec. 18, 2002 <<http://www.nytimes.com/2002/12/18/nyregion/18TENU.html>>; Charm School, *New Republic*, Dec. 30, 2002, at 11; David Orland, *Refusing to Play the Game*, *Boundless Webzine*, Dec. 2002 <[http://www.boundless.org/2002\\_2003/features/a0000691.html](http://www.boundless.org/2002_2003/features/a0000691.html)> (last visited Feb. 17, 2003).

52. Orland, *supra* note 51.

53. *Id.*

54. Dorothy Rabinowitz, *The Battle of Brooklyn*, *Wall St. J.*, Dec. 20, 2002, 2002 WL-WSJ 103129362; Orland, *supra* note 51.

55. Rabinowitz, *supra* note 54; Arenson, *supra* note 51. Brooklyn College's president later declined to follow the department's committee's recommendation not to renew Johnson's contract for another year. See Rabinowitz, *supra* note 54.

56. Charm School, *supra* note 51, at 11.

If consistent press reports are to be believed, Johnson's denial of tenure had little to do with collegiality, at least as legitimately defined. Johnson was apparently much more politically conservative than his colleagues. He raised some hackles, for example, when he criticized a post-September 11 teach-in at the college as too hostile to an American military response and featuring no supporters of U.S. or Israeli policy.<sup>57</sup> The specific locus of Johnson's problem, however, became the positions he advocated as a member of his department's appointments committee.

During his tenure year Johnson apparently refused to go along with his department chair and other colleagues who decided that a particular position should be reserved for a woman.<sup>58</sup> And he took the position that the department should not "tender a job offer to an applicant possessing neither a complete dissertation nor strong teaching evaluations."<sup>59</sup> There is no question that Johnson's stance on these issues was adamant. He charged that "the committee's chairwoman was being heavy handed in telling [committee members] what questions to ask [of potential candidates]. The chairwoman and others charged that Mr. Johnson was trying to bully the committee into accepting his views and that he would not listen to others who he believed had not scrutinized candidates' records as carefully as he had."<sup>60</sup> Johnson opposed making a candidate whom he saw as weak a finalist, comparing the candidate to a junior professor who had left the department.

Johnson's department chair reportedly considered this comparison "preposterous, specious, and demeaning,"<sup>61</sup> and ultimately decided to oppose Johnson's bid for tenure.<sup>62</sup> He initially charged that Johnson had violated certain curricular rules, but eventually took the position that Johnson's failure was a lack of collegiality.<sup>63</sup> A faculty allegedly unhappy with Johnson and his politics were apparently ready to join the fray. Claimed lack of collegiality became the basis of Johnson's denial of tenure.

If these accounts are true, Robert Johnson's actions were not uncollegial. Nothing in the reports indicates that he did anything other than express his views about intellectual matters and the governance of Brooklyn College's history department in complete good faith. There is no indication that he resorted to ad hominem attacks or underhanded tactics; rather, it appears that some of his colleagues took offense at the criticism of them that was implicit in Johnson's own productivity and his stance on appointments.<sup>64</sup> He

57. Rabinowitz, *supra* note 54.

58. Orland, *supra* note 51.

59. Robert David "KC" Johnson, Why I Was Denied Tenure, History News Network, Nov. 25, 2002 <<http://www.historynewsnetwork.org/articles/1122.html>>.

60. Arenson, *supra* note 51.

61. *Id.*

62. Orland, *supra* note 51.

63. Rabinowitz, *supra* note 54.

64. A female colleague reportedly complained that Johnson's criticisms and the standards he set "terrorized" other young faculty members. Rabinowitz, *supra* note 54.

was described as “unduly uncooperative,”<sup>65</sup> but—as discussed above — collegiality does not require someone acting in good faith to cooperate with policies or actions he deems contrary to the interests of his college. Indeed, it appears that Johnson was ousted by a hostile faculty because, in the end, he was a thorn in some sides and failed to fit in.<sup>66</sup>

Collegiality concerns can also be a subterfuge for illegal discrimination. “Many people who oppose reliance on collegiality in faculty employment decisions argue that its use can easily become a mask for discrimination based on race, gender, age, religion, national origin, or disability.”<sup>67</sup> Although the discrimination might be overt, the greatest risk appears to be unconscious discrimination—the vague feeling among a faculty dominated by white males, for example, that a female, African-American, or Latino scholar does not seem to be a good fit with the department or college. This vague feeling might translate into skepticism about the outsider’s scholarship, particularly if the scholarship is unconventional. In the case of potential gender discrimination, there are some reports that males in a department may view a woman with a strong academic personality as “pushy,” “aggressive,” or “uppity.”<sup>68</sup>

The recent case of Carol Stepien may be an example of this phenomenon. Stepien, an aquatic biologist at Case Western Reserve University in Cleveland, Ohio, was widely published—author of a well-received textbook, among other things. She brought in hundreds of thousands of dollars in grant money, and in 1999 she received national attention for using DNA analysis to refute arguments that a Lake Erie fish, declared extinct in 1975, had returned. That same year, despite a reportedly outstanding record, Stepien was denied tenure by Case.<sup>69</sup>

According to the *New York Times*, Stepien ran into trouble in her all-male department because of her perceived “demanding and assertive” style. Suzanne Ferguson, a retired English department chair at Case, was quoted as saying, “Because Carol looks rather sweet and compliant, they thought they were hiring the good daughter . . . . But she wasn’t the good daughter. She was abrasive, she was pushy, and she didn’t consider people’s feelings about their pet projects. I was shocked by the tenure file the department had created. It was very clear they were trying to put together things they could use against her.” Stepien moved to Cleveland State University and sued Case Western Reserve. Ultimately the case was settled. The full details of the settlement have never been released, but in May 2002 Case donated \$10,000 to Stepien’s

65. Arenson, *supra* note 51.

66. Some critics have been less generous in their description of Brooklyn College’s actions. The historians protesting Johnson’s denial of tenure referenced the college’s “culture of mediocrity.” See Arenson, *supra* note 51. Orland attributes the problem to a “department badly at odds with itself, racked with political hostility, petty rivalry and unscrupulous opportunism.” Orland, *supra* note 51.

67. Connell & Savage, Does Collegiality Count? *supra* note 3, at 3.

68. Lewin, *supra* note 12, at 1.

69. *Id.*

laboratory in recognition of her teaching, research, and service at Case prior to her departure.<sup>70</sup>

The reported facts are too ambiguous for an outsider to conclude with any certainty whether Stepien was the victim of discrimination or a truly uncollegial member of her department. But the flavor of the case raises the real possibility that an all-male department simply refused to tolerate behavior by a woman that it would have found perfectly acceptable, perhaps even admirable, in a man. Though not conclusive, the settlement favorable to Stepien would seem to support this interpretation.

### 3. Balance of Costs and Benefits

Not surprisingly, the foregoing cost-benefit analysis suggests that enforcing collegiality has both significant potential benefits and serious potential risks. For some, such as the AAUP, fear of the risks counsels in favor of eschewing enforcement altogether.<sup>71</sup> I think this approach is not only unwarranted, it is downright counterproductive. Its result is the possibility, and in some cases the reality, of an entire department's being dominated by one or two very aggressive bad actors. Unchecked, even one such person can make a workplace insufferable and severely diminish an institution's overall effectiveness. This is a terrible price to pay for the protection of everyone's perceived right to be left alone. On the other hand, a school should be wary of empowering collegiality police who use norm enforcement as a weapon rather than a shield. Overall, the right answer appears to be that a faculty should work to strike a balance; it should enforce an expectation of baseline collegiality while guarding vigilantly against its use to silence or impede the unusual, unpopular, or unorthodox. Methods of achieving such a balance are discussed in the next part of this article.

## III. Promoting Collegiality

### A. Location of Authority to Enforce Collegiality

If a norm of collegiality is to be enforced, the first enforcers ought to be the faculty. Peer pressure can go a long way toward achieving an atmosphere of institutional collegiality and—given its informal nature—is the least likely to impinge upon anyone's academic freedom. If the faculty fails in policing one of its own, of course, administrative action may be warranted. In addition, if the offending faculty member's actions go beyond "mere" uncollegiality and implicate, for example, issues of sexual harassment, administrative action from the outset may be unavoidable.

On the other hand, faculties have been known to gang up on one of their own.<sup>72</sup> So prudence dictates that the official actions of a faculty, such as recommendations regarding a colleague's promotion or tenure, be reviewed

70. *Id.*

71. See On Collegiality, *supra* note 7.

72. The Brooklyn history department's recommendation to deny tenure to Robert Johnson appears to be a recent case in point.

by an administrative arm of the university situated beyond the particular department and above its daily fray. Members of such review committees should take the collegiality concerns of a department's members seriously, for one person's extreme lack of baseline collegiality can severely hamper colleagues' morale and impede the productivity of an entire department. At the same time, the secondary reviewers should remain sensitive to the risk that collegiality is being used as a cover for discrimination or other inappropriate motivation. They should not reflexively support a department that appears to be treating one of its members unfairly.<sup>73</sup>

### *B. Collegiality as an Explicit Requirement of Job Performance*

These musings implicitly answer a second question: whether collegiality should be an overt part of a teacher's evaluation process. The AAUP says not, contending that notions of collegiality are inherent in teaching, research, and service, and should be evaluated only to the extent that lack of collegiality affects performance in one of these traditional areas.<sup>74</sup> The AAUP is exactly wrong on this point. Leaving collegiality in the shadows simply invites dishonest evaluation of a colleague's performance: a faculty unhappy with a colleague perceived to be uncollegial will likely find something inadequate about that person's teaching, research, or service. This is easy to do, since evaluation of these criteria is itself quite subjective. As a result, the harmed faculty member will be fighting ghosts.<sup>75</sup> And because the academy is incredibly diverse, the university committee reviewing the department's recommendation will likely defer to its judgments, especially on issues of scholarship. The risk of abuse of collegiality enforcement is heightened by the subterfuge.

In contrast, making baseline collegiality an explicit employment criterion has the advantage of putting any person who joins a faculty on notice of the requirements of the job. If the individual is engaging in behavior that his peers view as uncollegial, pretenure and other evaluations that include a collegiality criterion will necessarily give him notice of this fact. The resulting open discussion would promote shared understandings of acceptable behavior. If, for failing in collegiality, a department ultimately recommended against a member's promotion or tenure, or if the dean denied him salary increases, or if the university sought to fire him, there would be an explicit finding to that effect in the person's employment record, presumably supported with documentation specifying the alleged uncollegial acts. This record would be accessible to the affected faculty member and could be contested head on. And it would be available for examination by the university committee reviewing the department's recommendation.

73. The existence of a reviewing body outside of the particular department, of course, is no guarantee of the right outcome. Again, the Johnson case is relevant.

74. See *On Collegiality*, *supra* note 7.

75. The case of Robert Johnson provides evidence. Once his department chair allegedly turned against him, the initial charge was violation of institutional policy. Only later did the claim change to lack of collegiality.



### C. *Statement of Academic Professional Responsibility*

Collegiality begins at home. That is, every member of the academy should, in the first instance, take affirmative responsibility for his or her conduct. There are probably a number of ways that this can be accomplished. One method is for the faculty in each department of a university to debate and adopt its own Standards of Academic Professional Responsibility. The advantages of such a process should be clear: participation in the creation of standards would enhance the degree to which all faculty became invested in the need to act collegially and accepted the specific standards adopted by their department. Additionally, standards created on the local level could be tailored to the unique functions, mission, and history of the particular department. Of course, once a department created and ratified a set of standards, they would become a patent expectation of the job, and new members would be advised accordingly.

Because the concept of collegiality is complex, any set of standards should differentiate between baseline collegiality and affirmative collegiality. The standards should make clear that affirmative collegiality is aspirational; performance at this level would not be institutionally mandated but would surely be encouraged and rewarded by the institution. On the other hand, serious or persistent lapses in baseline collegiality would subject a faculty member to a formal response from her colleagues, institution, or both.

A sample set of standards for the law school setting appears below. They are written in the first person to emphasize that collegiality is, at its core, the personal responsibility of each individual member of a faculty. The statement is designed, in effect, as a pledge.

#### STATEMENT OF ACADEMIC PROFESSIONAL RESPONSIBILITY

##### I. Fundamental Requirements of Collegiality

1. *Minimum job performance.* I will do all traditional aspects of my job—teaching, scholarship, and service—as assigned and at least at a level consistent with the minimum expectations of my colleagues and institution.
2. *Good faith.* When addressing matters of law school policy, I will always operate in good faith, meaning that I will advocate positions that I truly believe are in the best interest of the school and its constituencies—faculty, staff, students, and alumni—and not those that are solely in my own self-interest.
3. *Fiscal responsibility.* When participating in decisions concerning the expenditure of law school funds, I will always keep in mind my responsibility to the law school's tuition payers, taxpayers [in the case of a public school], and contributors, and will strive to support expenditures that enhance the institution and further its mission.
4. *Civility.* I will always treat others—colleagues, students, staff, administrators, and outsiders (such as reporters)—with patience, courtesy, and respect. While I may choose in appropriate con-

texts to be tough or stern, I will never knowingly be mean, nasty, sarcastic, aggressive, rude, or obnoxious in my interactions with others. If the action of another makes me angry, I will calm down before responding; I will strive never to act out of bad temper or pique. I will always speak and write using words appropriate for a person in my position, that is, a member of the legal and academic professions with a responsibility to set an example for those training to enter these professions.

5. *Reciprocity*. In addition to being civil, I will begin all my interactions with colleagues assuming that they, too, are striving to be the best faculty members possible and, in particular, are acting in good faith. Recognizing that disagreements among persons of good faith are possible and even likely, I will in all instances of disagreement communicate my point of view without questioning my colleagues' motivations, integrity, competence, or right to hold a view different from my own. When matters are settled by faculty vote, I will accept the outcome of that vote as the decision of the institution and strive to understand and accept the wisdom of my colleagues. On matters about which I feel strongly, I may continue to work to amend the policy, but always with civility and reciprocity.
6. *Respect for authority*. I recognize that the dean, associate deans, assistant deans, and other administrators have difficult jobs. Nevertheless, in the appropriate fora, I will not hesitate to express my views on institutional governance and my disagreements with the actions or policies of the administration. But I will strive to do so always in good faith, and always with civility and reciprocity.

## II. Aspirational Collegiality

1. *Zeal*. I will aspire to do all aspects of my job—teaching, scholarship, and service—to the best of my ability and in ways that bring me personal satisfaction, contribute to the greater good, bear well on my professional reputation, and add to the reputation and stature of my institution.
2. *Physical presence*. I will strive to be a full participant in the life of my institution, making every effort to attend faculty and committee meetings, enrichment events, candidate interviews, faculty and staff social events, optional student activities, and social events involving students. Although I might work at home as necessary, I will strive to work in my office at the law school enough to ensure that my presence at the school is felt by others, including colleagues and students.
3. *Administrative support*. I will provide support to the administrative units of the law school—e.g., admissions, student affairs, career services—whenever asked to the fullest extent possible.

4. *Special assignments.* I will take on special assignments given to me by my colleagues or the dean to the fullest extent possible.
5. *Cordial relationships.* I will strive at all times to treat my colleagues and all other employees of the law school in a pleasant and cordial manner. I will assist whenever possible and in any way I can to help resolve internal conflicts and to promote productive and harmonious relationships among all members of the law school community.
6. *Good colleague.* I will strive to be an engaged and helpful colleague, reading and commenting on drafts of others' work when requested, and initiating and participating in informal conversations concerning scholarship and teaching. I will share the products of my own efforts—such as course syllabi, article reprints, conference materials—with my colleagues whenever these products might be useful to them.

#### *D. Enforcement Mechanisms*

Assuming that a faculty has adopted a collegiality requirement, and further assuming everyone's best intentions, occasional lapses in baseline collegiality will nevertheless occur. Although overreaction must be avoided, lapses in the community's minimum expectations should be systematically addressed. The reaction, of course, should be appropriate to the breach and should take into account whether the malfeasance has been uncollegial in the past.

In many cases the best method of enforcing norms will be some form of simple peer pressure. Colleagues should in the first instance police themselves and each other, avoiding administrative intervention to the extent possible, thereby minimizing the potential for conflict with academic freedom. At the most basic level, someone who is witness to or the recipient of a colleague's uncollegial conduct should acknowledge it and request that the offending behavior be altered. For example, if one receives a flaming e-mail, one might respond by politely pointing out that it is objectionable and informing the flamer that the substance of the e-mail will not be addressed unless it is represented in a collegial manner. The offender would then have two choices: repackage the message or be ignored. If done with consistency, responses of this type would likely minimize the uncollegial behavior.

If someone's uncollegial behavior is more frequent, the next level of informal enforcement might be for a respected senior member of the faculty to counsel the offender about his unacceptable conduct. If these relatively benign methods fail, a faculty might want to have in place a procedure empowering it to censure a colleague for persistent uncollegial conduct. Such a procedure might include a technique of "charging" someone with uncollegiality and a process through which the charge is evaluated before coming to the full body for a vote. Obviously, the censure of a colleague could itself be a controversial and potentially divisive event; if used at all, it should be reserved for extreme cases involving someone whose negative behavior is

impairing, in a profound and universal way, the faculty's ability to accomplish its mission.<sup>76</sup>

If all methods of peer pressure fail, or if the offensive conduct is such that it could bring liability to the university if not formally addressed, administrative action may be unavoidable. Such action would be disciplinary in nature and would follow the path of other disciplinary matters at the institution. Typically, punishment for violations of a school's code of conduct range from an informal oral reprimand and administrative counseling for a first offense, to a formal written reprimand, maintained in the offender's personnel file, for additional or more serious offenses, and ultimately to suspension or termination in the rare case of egregious or persistent misconduct.

#### IV. Coping with Difficult Colleagues

For most academics, uncollegial conduct is the aberration—a momentary lapse due to stress, perhaps, or unintentional insensitivity to another's feelings. Those in this vast majority would react with horror to learning that they had offended a colleague, and they would offer an immediate and sincere apology. Every faculty, however, is likely to have one or more members for whom uncollegial behavior is, unfortunately, a *modus operandi*. Although a very small minority, such people can dominate their peers and have an extraordinarily negative impact on the atmosphere of their department and the morale of their colleagues. Formal action by the faculty or the institution, though warranted, simply may not take place. Even if formal action is pursued, it may take months or years to implement and, if it falls short of termination, its effectiveness may be limited. In the meantime, recipients of the uncollegial behavior will continue to be harmed.

Accordingly, individual academics will find that they must, from time to time, deal with one or more difficult colleagues. Recognizing this reality, and developing some techniques to cope with it, can minimize the impact of uncollegial behavior on one's productivity and morale. Given that difficult people are found in all aspects of life, a number of books have been written on the subject of dealing with them.<sup>77</sup> Although many of these books may fairly be categorized as pop psychology, they do in fact provide some useful guidance, some of which is set out in this section.<sup>78</sup>

76. The act of censuring a colleague could have secondary benefits beyond the sanctioning of the offending party. To the extent that the persistent uncollegial conduct has harmed morale, the act of censure would be an important step toward repairing the damage. By taking collective action, the collegial members of the faculty would regain a sense of empowerment and control over the atmosphere of their institution.

77. See, e.g., Muriel Solomon, *Working with Difficult People* (New York, 2002); Sandra A. Crowe, *Since Strangling Isn't An Option . . . Dealing with Difficult People—Common Problems and Uncommon Solutions* (New York, 1999); Marilyn Wheeler, *Problem People at Work* (New York, 1995); Robert Bramson, *Coping with Difficult People* (New York, 1981).

78. I recognize that this is unusual subject matter for a law journal. However, I am convinced that coping techniques for dealing with difficult colleagues are both nonobvious and important. Some of my certainty results from having helped friends deal with people they perceived as difficult by providing them with the information set out below.

When one finds a particular colleague irritating, the first question to ask is *Am I the problem?* Each of us sometimes reacts negatively to another person because of our own prejudices, insecurities, or lack of patience or tolerance, and the reaction may well be out of proportion to the other person's behavior. Out of fairness, one should be hesitant to label another person "difficult." An imperfect but useful measure is the opinion of others. If there appears to be a consensus among a group of reasonable people that Zeus's behavior is uncollegial, then it is likely that Zeus is, indeed, the problem. On the other hand, anyone who finds himself having a difficult time dealing with lots of different people would be well advised to consider seriously whether he is the offending party.

Assuming, however, that the problem is Zeus, the next question to ask is *Do I need to deal with Zeus?* For mere colleagues—fellow faculty members—of a difficult person, the answer may very well be no. If that's the case, the solution is obvious: they should not interact with him. In other words, one simple method of handling a difficult person is avoidance. An uncollegial person cannot be uncollegial to someone who has no contact with him. Avoidance should also include steadfastly refusing to talk about the troublesome colleague with others. In the first place, such gossip is impolite and uncollegial in and of itself; in addition, participating in such conversation is an indirect means by which people permit the uncollegial behavior to maintain a hold over them. If all members of a faculty were to practice this kind of avoidance, the result in many cases would be to isolate the uncollegial person and minimize his impact on the operation and morale of the institution.

For example, tales are sometimes told about faculty who cannot resist regularly sending flaming e-mails to their colleagues. Some recipients of these e-mails, such as the dean and, say, the chair of a committee on which the e-mail abuser serves, may have no choice but to open the e-mails, read them, and respond. But many other faculty probably have the choice of deleting without opening all e-mails sent by the flamer. In truly extreme cases, this may be the appropriate coping mechanism. Preceding this action with a note to the e-mail abuser politely informing her of one's decision puts her on notice that, if she wishes to communicate, it must be through some other medium. It also tells her that whatever aims she is seeking through this uncollegial activity will not be achieved. If she receives a similar message from a sufficient number of colleagues, she might even alter her destructive behavior; acting out is no fun without an audience.

In most instances, complete avoidance will be impossible. The difficult colleague will have to be engaged, at least on occasion. When engagement is necessary, one should try to identify the type of difficult personality being confronted and determine the appropriate coping strategies. Although there are many types of difficult personalities, some are more challenging than others, and an even smaller subset are the most likely to infect the atmosphere of an academic institution.

*A. Hostile Aggressives (HAs)*

It is not hard to recognize a hostile aggressive colleague. Hostile aggressives are the bullies on a faculty: they attempt to get their way by intimidating others—by shouting at faculty meetings, glaring at anyone who disagrees with them, or sending overbearing memoranda or e-mails. They are sure they are right, and they will see to it that all others agree. They walk right over weaker personalities. As Sandra Crowe describes them:

Aggressive people are loud; their gestures are intimidating; they try to plow through others with force. They interrupt, push, and manipulate. They're argumentative and they project a hateful attitude. [They] can be situationally difficult or genetically difficult. The former can't negotiate life's bumps and curves; the latter take pleasure in being difficult. . . . They're . . . explosive and rude. Not only don't they consider your needs, but they don't stop to think you might have any.<sup>79</sup>

Robert Bramson notes that HAs are often arrogant and contemptuous of their victims, "considering them to be inferior people who deserve to be bullied and disparaged."<sup>80</sup> He points out that HAs may attempt to achieve their dominance not only through tirade, but also through unrelenting criticism and argument that pushes others into acquiescence, often against their own better judgment. An HA's entire demeanor expresses attack, and the reaction he gets is usually fright and flight.

The first rule of thumb when dealing with an HA is to avoid returning aggression with aggression. If one tries to take on an HA head to head, the result will simply be an escalation in the level of hostility. Moreover, a respondent who plays in the HA's arena is likely to lose the fight. HAs are professionals at being combative; they have built a repertoire of aggressive tactics over a lifetime and resort to them because they are usually successful. A non-HA trying to battle an HA is a mere amateur, and is likely to get his head handed to him in rude-to-rude combat.<sup>81</sup>

On the other hand, one cannot afford to show weakness: the HA will smell blood and move in for the kill. So colleagues must learn to respond to the HA's onslaught by being firm and assertive without being aggressive.<sup>82</sup> The goal is to demonstrate to the HA that his usual arsenal of obnoxious actions will not succeed. Once convinced, he will either take his hostility elsewhere, or slowly employ less aggressive means of communication, because these will become his only means of achieving success.

The specific steps one should take when faced with aggressive behavior:

1. *Mentally prepare.* Remind yourself that the HA's attack is not really personal—it is the means by which he deals with the world. Step back from the attack and mentally rise above it. If you take what the HA says to heart, you will

79. Crowe, *supra* note 77, at 116–17.

80. Bramson, *supra* note 77, at 12.

81. Bramson, *supra* note 77, at 17–18. Another reason not to return the aggression is that, if you do, others may see you as the hostile aggressor. *Id.* at 19.

82. Crowe, *supra* note 77, at 117.

not be able to deal with him with detachment, which is what a successful encounter will require.<sup>83</sup>

2. *Do not engage the fight.* Let the verbal tirade go on without reaction. Do not respond in kind. Eventually, the HA's steam will run out and you can engage him on the territory of your choosing. If his onslaught is unrelenting, consider simply leaving and postponing any interaction until another time.<sup>84</sup>

3. *Stand firm.* This advice is both literal and figurative. The HA is expecting you to show weakness—in your body language or words, or both. Think about your posture, mentally confirm your resolve. Lean toward the HA, look her directly in the eye. Speak firmly and directly, without aggression or hostility.<sup>85</sup>

4. *Express your disapproval.* You should tell the HA, calmly and politely, that his aggressive behavior is not acceptable and, more important to the HA, will not be effective in achieving his results. Advise him that you will not tolerate being treated in a rude or hostile manner.<sup>86</sup>

5. *Engage the substance.* Ask the HA to restate his position in an acceptable manner, or restate the substance of his position for him. If his aggressive behavior subsides, take up the matter on its merits.<sup>87</sup>

6. *Remain firm.* Throughout your interaction, remain committed to nontolerance of unacceptable behavior. If he tries to interrupt you, say, "You interrupted me," and continue speaking.<sup>88</sup> If he resorts to aggressive behavior again, call him on it.

7. *Be prepared to terminate the interaction.* If the aggressive behavior is unrelenting, end the interaction. Let the HA know why you are ending it, and tell him that you are prepared to discuss the matter at another time when he can manage to treat you with appropriate respect.<sup>89</sup>

An interesting thing about HAs is that they may end up respecting people who are not intimidated by them. So resolve may be rewarded with overtly friendly behavior. Obviously, positive behavior ought to be reinforced; friendliness should be returned in kind.<sup>90</sup>

### B. Sarcastic Wits (SWs)

Law teachers are smart people, and smart people sometimes show their aggression through sarcasm and wit. If used as a weapon, unrelenting sarcasm

83. Crowe calls this step "neutralizing." Crowe, *supra* note 77, at 118–19.

84. See Wheeler, *supra* note 77, at 40; Solomon, *supra* note 77, at 13; Crowe, *supra* note 77, at 120.

85. See Crowe, *supra* note 77, at 119–20; Solomon, *supra* note 77, at 20.

86. See Wheeler, *supra* note 77, at 40.

87. See Crowe, *supra* note 77, at 121–28.

88. See Bramson, *supra* note 77, at 16.

89. See Wheeler, *supra* note 77, at 40.

90. A variation of the HA is the "exploder": a person who is collegial most of the time but is prone to fits of anger and outbursts, which Bramson calls "adult tantrums." Bramson, *supra* note 77, at 34. Exploders are generally easier to deal with than HAs because they are not consistently aggressive. Dealing with an exploder is similar to dealing with an HA; one should focus on giving her time to run out of steam and regain self-control. See *id.* at 37–41.

can be every bit as rude and intimidating as a direct attack. The sarcastic person simply clothes the attack in purported humor, setting up the defense that she is "only joking" if challenged.

A common response to a sarcastic attack is to pretend that it did not take place. Worse, because of social convention, witnesses to sarcasm directed at another person often laugh—though perhaps uncomfortably—at the supposed humor. These responses, though polite on the surface, empower the SW to control the situation and encourage additional uncollegial behavior. The presence of an SW on a faculty, if the behavior is unchecked, can mean demoralized capitulation.

Just like other hostile aggression, sarcastic behavior needs to be acknowledged and handled. The first step is to "surface the attack"; that is, the recipient should ask the SW who has just made an indirect critical remark whether she meant the criticism. Usually the SW will deny the intent. This should be accepted on its face; by bringing the attack out into the open and forcing the denial, the recipient has made the point that the sniping behavior will not be tolerated.<sup>91</sup> The next step, however, should be constructive. To the extent that the sarcasm indicated a real problem, the substance of the problem should be dealt with in a nonconfrontational manner. This does not mean capitulation, but constructive engagement.<sup>92</sup>

### C. *Borderline Personality Disorder (BPD)*

By far the most difficult people to deal with are those with true personality disorders. As defined by the bible of psychiatric diagnosis, the DSM-IV, a personality disorder is "an enduring pattern of inner experience and behavior that deviates markedly from the expectation of an individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment."<sup>93</sup> People with personality disorders consistently "act in disturbing patterns of behavior in both occupational and social relationships."<sup>94</sup> Common types of personality disorders include paranoid, schizoid, schizotypal, antisocial, narcissistic, histrionic, borderline, obsessive compulsive, avoidant, dependent, and passive aggressive.<sup>95</sup> Individuals with personality disorders can be quite functional; it is not uncommon to find them in the workplace. One study estimated that eighty percent of Americans have to deal with at least one person at work whose personality traits appear to fit one of the recognized disorders.<sup>96</sup>

91. See Bramson, *supra* note 77, at 29–30; Solomon, *supra* note 77, at 141; Wheeler, *supra* note 77, at 54.

92. See Bramson, *supra* note 77, at 31–32; Solomon, *supra* note 77, at 141–44.

93. American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders*, 4th ed., 629 (Washington, 1994) [hereinafter DSM-IV].

94. Alan A. Cavaola & Neil L. Lavender, *Toxic Coworkers: How to Deal with Dysfunctional People on the Job 4* (Oakland, 2000).

95. *Id.* at 4–5.

96. See *id.* at 3.



Each personality disorder is characterized by its own set of problematic behaviors that can cause coworkers anguish and stress. Of all the disorders, however, "the borderline is probably the most difficult to deal with and the greatest challenge to organizational structure. This is due to the fact that the smooth functioning of any [organization] is dependent on the ability of its people to work cooperatively with one another. The core problem of the borderline is the *inability* to have stable and sane relationships."<sup>97</sup>

The formal diagnostic criteria for BPD are set out in the DSM-IV:

A pervasive pattern of instability of interpersonal relationships, self-image and affects, and marked impulsivity beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following:

1. [F]rantic efforts to avoid real or imagined abandonment. . . .
2. [A] pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation[.]
3. [I]dentity disturbance: markedly and persistently unstable self-image or sense of self[.]
4. [I]mpulsivity in at least two areas that are potentially self-damaging (e.g., spending, sex, substance abuse, reckless driving, binge eating). . . .
5. [R]ecurrent suicidal behavior, gestures, or threats, or self-mutilating behavior[.]
6. [A]ffective instability due to a marked reactivity of mood (e.g., intense episodic dysphoria, irritability, or anxiety usually lasting a few hours and only rarely more than a few days).
7. [C]hronic feelings of emptiness[.]
8. [I]nappropriate, intense anger or difficulty controlling anger (e.g., frequent displays of temper, constant anger, recurrent physical fights)[.]
9. [T]ransient, stress-related paranoid ideation or severe dissociative symptoms[.]<sup>98</sup>

In short, borderlines have an intense and deep-seated fear of abandonment. The fear itself is usually buried; it is most commonly manifested as anger at those who cause the borderline to sense rejection, whether real or imagined.<sup>99</sup> In the workplace, this often means that a borderline is intensely sensitive to minor slights or negative feedback. For example, he might interpret a

97. *Id.* at 79. If the discussion that follows seems exaggerated to the reader, it is likely because the reader has never had to deal with a borderline. A reader who has dealt with a borderline without knowing about BPD is likely to read what follows with a sense of "Aha!" and see an impossible relationship in a new light. My personal experience with borderlines includes a relative, thankfully not a member of my immediate family.

Though borderlines are not often portrayed in the popular media, characters from two movies appear to suffer from the disorder: Glenn Close's character in *Fatal Attraction*, and Bill Murray's character in *What About Bob?* See *id.* at 81. Readers who have not dealt with a borderline and want to get a sense of what it's like are encouraged to see one or both of these movies.

98. DSM-IV, *supra* note 93, at 654.

99. Paul T. Mason & Randi Kreger, *Stop Walking on Eggshells: Taking Your Life Back When Someone You Care About Has Borderline Personality Disorder* 27–28 (Oakland, 1998).

colleague's being late for an appointment as an indication that the colleague doesn't like him and wants to end any positive relationship with him.<sup>100</sup>

Persons suffering from BPD also exhibit a psychological phenomenon called splitting. Splitting is seeing people and things as all or nothing, black or white, good or evil. It is the inability to integrate emotional data and formulate a middle ground. Borderlines either love a person or hate him, and they often move quickly from love to hate after some perceived disappointment or insult.<sup>101</sup> In the academic setting, for example, a borderline might initially view an incoming dean as the savior of the institution, and anticipate that the new administrator will effect wonderful, fabulous, unimaginable improvement to the school. But the honeymoon ends quickly; as soon as the new dean makes a decision with which the borderline disagrees, the dean becomes the enemy. Splitting also causes borderlines to focus on their latest interaction with another person. So, for instance, even if a colleague has for years supported the position of the borderline on issues of faculty governance, their relationship may be permanently harmed as soon as the first disagreement arises.<sup>102</sup>

Borderlines also lack a core identity or sense of self. "Core values are about the things that we love the most in life, the things that we aim our energies and efforts at achieving, the things we want most in life . . . the very essence of who we are." Lacking core values, the borderline "gets tossed around by every intense passion, temptation, and fad that comes her way."<sup>103</sup> Identity issues cause the borderline to be impulsive and, for some BPD sufferers, prone to suicide and self-mutilation.<sup>104</sup> The borderline's often obnoxious outward behavior stems from unconscious efforts to mask excruciating inner torture.<sup>105</sup>

Borderlines exhibit excessive and intense mood swings, and they harbor constant underlying anger and contempt. The latter often leaks out as cynicism or sarcasm, or it may result in an explosion of rage. "When the borderline becomes angry, they hate everyone and everything, often attacking blindly and wildly. . . . This hatred can be highly toxic to those around them, and, in the organizational environment, may often lead to litigation as the borderline misinterprets the actions of others as being deliberately malevolent."<sup>106</sup>

Borderlines typically present several additional personality traits. As they split issues into black and white, they frequently have an uncanny ability to draw other persons into their battles, making them take sides.<sup>107</sup> They are often referred to as "manipulative," though some psychologists reject this

100. See Cavaiola & Lavender, *supra* note 94, at 80.

101. See *id.* at 80–81; Mason & Kreger, *supra* note 99, at 30–33.

102. See Mason & Kreger, *supra* note 99, at 31, 34.

103. Cavaiola & Lavender, *supra* note 94, at 81, 82.

104. See Mason & Kreger, *supra* note 99, at 33–39.

105. See Marsha M. Linehan, *Cognitive-Behavioral Treatment of Borderline Personality Disorder* 71 (New York, 1993).

106. Cavaiola & Lavender, *supra* note 94, at 83; see also Mason & Kreger, *supra* note 99, at 39–42.

107. Cavaiola & Lavender, *supra* note 94, at 84.

term because it implies intentionality and blame, which these psychologists claim is not present.<sup>108</sup> People who interact with a borderline, however, are likely to feel manipulated: the borderline's intense personality always seems to be focused on what others must do to satisfy her needs, and her needs are endless.<sup>109</sup> Borderlines also lack the ability to respect interpersonal boundaries.<sup>110</sup> They are the coworkers most likely to invade a colleague's personal space; they may call or e-mail someone at home at any hour of the day or night, or attempt to insinuate themselves, uninvited, into a coworker's personal life.<sup>111</sup> Finally, borderlines typically do not recognize that they have a problem; rather, they believe everyone else is at fault. Indeed, this trait makes them among the most difficult patients that psychologists encounter: as soon as the psychologist suggests that the borderline's own behavior might be the source of some of her problems, the borderline interprets this as abandonment and turns against the would-be caregiver.<sup>112</sup>

Persons with BPD are so prevalent and problematic that many books have been written to advise how to deal with them. Most of these books are aimed at those whose relationship with the borderline is close and essentially inescapable—parents, children, spouse.<sup>113</sup> For coworkers, probably the most important factor in coping with a borderline is recognizing the personality disorder in action. Once it is recognized, a person with BPD can be handled effectively. The most important tool is maintaining detachment: the borderline simply cannot control his need to act out, so one must not take his insulting or manipulative behavior personally. Reacting personally simply means playing on the borderline's warped turf. Rather, one should try to understand that the borderline's anger is really hurt, and to meet it, if at all possible, with compassion rather than retaliation.<sup>114</sup>

Equally important, one must constantly be on guard to avoid getting caught up in the borderline's psychological gyrations. This means setting boundaries and sticking to them. The boundaries may need to include strict limits on the

108. See Linehan, *supra* note 105, at 16–17.

109. See Mason & Kreger, *supra* note 99, at 45–47.

110. See *id.* at 42–43; see also Lineham, *supra* note 105, at 135–37 (discussing borderlines' tendencies to push the limits of therapists and their organizations).

111. See Cavaola & Lavender, *supra* note 94, at 84.

112. See Lineham, *supra* note 105, at 76–77 (discussing the difficulties that arise from borderline patients' self-invalidation resulting in resistance to traditional therapies).

113. See, e.g., Mason & Kreger, *supra* note 99; Christine Ann Lawson, *Understanding the Borderline Mother: Helping Her Children Transcend the Intense, Unpredictable, and Volatile Relationship* (Northvale, 2002); Randi Kreger & Kim A. Williams, *Love and Loathing: Protecting Your Mental Health and Legal Rights When Your Partner Has Borderline Personality Disorder* (Harrison, N.Y.); Kathy Winkler & Randi Kreger, *Hope for Parents: Helping Your Borderline Son or Daughter Without Sacrificing Your Family or Yourself* (Milwaukee, 2001); Anthony Walker, *Siren's Dance: My Marriage to a Borderline* (Emmaus, 2003); Jerold J. Kriesman & Hal Straus, *I Hate You—Don't Leave Me: Understanding the Borderline Personality* (Los Angeles, 1991). One of the best books on borderlines provides advice to therapists on how to treat them. See Linehan, *supra* note 105.

114. See Cavaola & Lavender, *supra* note 94, at 89. For a full panoply of communication techniques to employ when dealing with a borderline, see Mason & Kreger, *supra* note 99, at 130–38.

time, place, and manner in which one is willing to interact with the borderline. If the borderline respects the boundaries, communication can take place. If not, communication should be terminated until such time as the borderline can regain control and act within the limits set.<sup>115</sup>

Experts provide this additional advice for dealing with a borderline in the workplace:

If the borderline is too dysfunctional, you will need to let them know that you are just there to do your job and have no desire to have a personal relationship with them. . . . Be sure not to get ensnared in their personal problems. Never ask them to bend the rules for you or to give you special consideration because they will ask you for the same some day. Never ask them to become involved in your personal life. . . . Stick to your job and minimize your interactions with them. Finally, you should understand that the borderline might back you into a position where you have no choice but to do some things that are unpleasant to you. This might take the form of having to report them to your supervisor for things like sexual harassment, physical or verbal abuse, or some other boundary violation. [On the other hand,] you might be called upon to . . . defend yourself against accusations which they have made against you.<sup>116</sup>

Finally, colleagues of a borderline should always remember that BPD behavior is rooted in deep-seated psychological issues and, unless the borderline is in therapy, is not going to change. Hoping that the borderline will behave better in the future is probably fantasy, and attempting to alter the borderline's behavior in the present is an exercise in futility. The only thing that coworkers can change is themselves. They can decide to set limits and to detach, so that the impact of the borderline's machinations on their morale and on their institution's effectiveness is minimized.<sup>117</sup>

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The problem of collegiality in academia is like a crazy aunt in the family: ever present, whispered about in hallways, but rarely acknowledged directly. My goal in this article has been to initiate the demise of this pattern of unhappy toleration. The toleration stems, in large part, from an apparently widespread fear that attempts to control colleagues' uncollegial conduct will result in an unacceptable diminution of academic freedom. Although these concerns are legitimate, I have sought to prove that, if appropriate care is taken, academic freedom may flourish at the same time that a norm of basic collegiality is enforced. Failure to maintain collegiality is potentially costly to the morale and productivity of an institution. The first line of defense in the battle for collegiality is manned by the faculty themselves; they must personally commit to collegial behavior, and they should use peer pressure to assure that their colleagues do the same.

115. See Cavaiola & Lavender, *supra* note 94, at 84; Mason & Kreger, *supra* note 99, at 118–30, 139–59.

116. Cavaiola & Lavender, *supra* note 94, at 89.

117. Cf. Mason & Kreger, *supra* note 99, at 24: "[A]lthough you can't change the person with BPD, you can change yourself. By examining your own behavior and modifying your actions, you can get off the emotional roller coaster you're on and reclaim your life."

I have also attempted to address another controversial subject: what to do when simple peer pressure fails and other institutional enforcement mechanisms have either been ineffective or have not yet been engaged. The end result is the presence on the faculty of a person whose behavior threatens to disrupt others' ability to do their jobs and the capacity of the institution to accomplish its mission. The subject is controversial because it necessarily acknowledges, openly and honestly, that difficult individuals thrive in the midst of academia. Once this reality is confronted, however, steps can be taken to ensure that their behavior is contained and their harm to the institution is ameliorated or, in the best of all possible worlds, eliminated.